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No. 14 – 114

In the Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF JEREMY RABKIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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QUESTION PRESENTED

Section 36B was added to the Internal Revenue Code of 1986, as amended ("the Code"), by Section 1401(a) of the Patient Protections and Affordable Care Act of 2010 ("the PPACA"); it permits the allowance of a sum as a "premium assistance tax credit" against a qualifying individual's income tax otherwise payable under Code §§ 1 *et seq*. For each month, the credit cannot be higher than the taxpayer's premium for group health coverage enrolled in "through an Exchange established by the State under section 1311 of the [PPACA]."

Did Respondents Secretary of the Treasury and Commissioner of the Internal Revenue lawfully issue regulations allowing a Code § 36B tax credit based on coverage enrolled in through an Exchange other than "an Exchange established by the State under section 1311 of the [PPACA]," such as an Exchange established by the Respondent Secretary of Health and Human Services under section 1321(c) of the PPACA?

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INTERESTS OF THE *AMICUS*[1]

Amicus curiae Jeremy Rabkin is a Professor of Law at the George Mason University School of Law, where he teaches advanced level courses in Administrative Law, Constitutional History, International Law, and Statutory Interpretation. *Amicus* believes strongly that both federalism and the separation of powers have important practical significance for preserving popular sovereignty in the form of a republic under the Constitution's unique plan of dividing delegated sovereign power to two governments (one state, one national).

Amicus submits this brief in support of Petitioners and urges reversal of the judgment below. *Amicus* agrees with the arguments made in Petitioners' Brief ("Pet. Br."), and hopes to contribute additional support for the Points in Section I.B of Petitioners' Summary of Argument. Pet. Br., at 12-13.

STATEMENT

The Act calls for creation of marketplaces referred to as "Exchanges" for obtaining insured health coverage. It includes two provisions related to establishing an Exchange: ACA §§ 1311 and 1321(c). The first concerns an Exchange established by a State, defined to include the states of the Union plus

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[1] Pursuant to Rule 37.6, *Amicus* affirm that no counsel for a party authored this brief in whole or in part; no such counsel or any party made a monetary contribution intended to fund its preparation or submission; and no person other than *Amicus* Jeremy Rabkin has made such a monetary contribution. The parties have filed blanket consents to the filing of briefs *amicus curiae* supporting any party or no party.

the District of Columbia. *See* ACA § 1304. The second concerns an Exchange established by Respondent Secretary of Health and Human Services ("the HHS Secretary").

The ACA also provides for a credit against a qualifying taxpayer's individual federal income tax otherwise due under Internal Revenue Code of 1986, as amended, 28 U.S.C. §§ 1 *et seq*. Code § 36B, as added by ACA § 1401(a), authorizes Respondents Secretary of the Treasury and Commissioner of the Internal Revenue Service ("the Service," and collectively, "the IRS") to allow a determinate amount as a "premium assistance tax credit" for the taxable year. Code § 36B(a)-(b)(1)-(2) includes a formula for determining the amount allowable. No amount is allowable unless the taxpayer, his or her spouse, and/or his or her dependents are enrolled for health coverage "through an Exchange established by a State under section 1311 of the PPACA." *See* 26 U.S.C. § 36B(b)(1)-(2).

The IRS issued regulations ("the IRS Rule") purporting to allow the Section 36B tax credit on enrollment for coverage through "an Exchange established [by a State] under section 1311 *or [by the HHS Secretary under section]* 1321." *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012); 26 C.F.R. §§ 1.36B-1 *et seq*. (emphasis added). *See also*, Prop. Treas. Reg. §§ 1.36B-1 *et seq*., Fed. Reg. Vol. 76, No. 159, p. 50931 (Aug. 8, 2011).

The Government asserts legality of the IRS Rule based primarily on the theory that an Exchange established by the HHS Secretary under ACA § 1321(c) is "an Exchange *established by a State* under

section 1311 [of the PPACA]" for purposes of Code § 36B. *Amicus* refers to this argument as the "equivalence theory."

The equivalence theory has serious following in academia,[2] and after the panel decision of the court

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[2] *Amicus* believes one source of this theory was Timothy S. Jost, the Robert L. Willett Family Professor of Law at Washington & Lee University Law School. *See* T. Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, (Sept. 11, 2011), available at www.healthreformwatch.com (last accessed December 23, 2014); see, also, Testimony of Professor Timothy Jost, HEARING before the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, Serial No. 112-187 (112th Cong., 2d Sess., Aug. 12, 2012) ("Hearing Tr."), 36 ("Under ACA, therefore, all exchanges, Federal and State, are 1311 exchanges established by the State by definition.") For other iterations of the theory, *see* Abbe Gluck, *Symposium: The grant in King – Obamacare subsidies as textualism's big test* (November 7, 2014), available at http://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test/ (last accessed December 3, 2014) (hereinafter, "Gluck"). *See also*, Nicholas Bagley, *Yes, Virginia. You can get tax credits in Virginia* (Jan. 14, 2014) ("What could 'such' exchange possibly refer to except the exchange 'required' under 1311? [available at The Incidental Economist, http://theincidentaleconomist.com/wordpress/yes-virginia-you-can-get-tax-credits-in-virginia/ (last visited December 23, 2014); Samuel Bagenstos, *The (Legally) Nonsensical Rearguard Challenge to Obamacare* (November 26, 2012), available at Disability Law, http://disabilitylaw.blogspot.de/2012/11/the-legally-nonsensical-rearguard.html (last visited December 23, 2014) ("Although the tax-credit provision twice uses the phrase "Exchange established by the State under section 1311," *see* 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i), that phrase does not have the exclusionary meaning . . attribute[d] to it. . . Section 1321 . . makes clear that, when a state fails to set up an exchange, the federally-operated exchange will stand in the shoes of the state

of appeals in this case and the district court's opinion in *Halbig v. Burwell*, 2014 WL 129023 (D.D.C. 2014), the theory has been re-articulated with great clarity by Professor Abbe Gluck:

> Section 1401 can still be read literally because the section that authorizes the federal exchanges, Section 1321, provides that if a state does not establish an exchange under Section 1311, the Department of Health and Human Services (HHS) "shall . . . establish and operate such Exchange within the State." In other words, HHS must "establish" a Section 1311 exchange, which is a state exchange. Moreover, the Act defines "Exchange," with a capital E, three times in the statute as a "state" exchange. And HHS, in Section 1321, is told to establish "*such* [capital E] Exchange." The Court need not add or delete a single word of the ACA to reach this conclusion.

See, Gluck, *supra*.[3]

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exchange . . . Section 1321 provides that if a state "will not have any *required Exchange* operational" by [January 1, 2014] -- that is, an exchange required by Section 1311 -- then the federal government "shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State." "[S]uch Exchange" in Section 1321 clearly refers to the Section 1311 exchange. When the federal government operates an exchange pursuant to Section 1321 . . . it is operating the state exchange that Section 1311 required the state to set up but that the state failed to create.").

[3] The Government and other advocates of the IRS Rule's legality embraced the equivalence theory at every stage of this case. *See, e.g.*, Br. for the Resp'ts in Opp'n, *King v. Burwell*, No. 14-114, 8-9, 12-15 (S. Ct. Oct. 2014); and, Def. Reply Mem. In

SUMMARY OF ARGUMENT

Petitioners rightly contend that this case is a simple statutory interpretation case. Petitioners also correctly identify the "operative language" of that statute, which is the phrase "established by a State

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Supp. Of Mot. To Dismiss, *King v. Burwell*, No. 3:13-cv-00630-JRS (E.D. Va. Dec. 6, 2013); Br. For Appellees, *King v. Burwell*, No. 3:13-cv-630 (Spencer) (4th Cir. Mar. 18, 2014). Similarly, *see*, Br. for the Appellees, *Halbig v. Burwell*, No. 14-5018, 13, 16, 20, 21-24, 46, 48, 49, 52 (D.C. Cir. Nov. 2014); Defs.' Mem. in Supp. of their Cross-mot. for Summ. J., *Indiana v. IRS*, Case No. 1:13-cv-01612-WTL-TAB, 2, 8, 15, 16, 17, 18, 21, 22, 24, 25, 27, 28, 29, 31, 36, 39 (S.D. In. April 2014). Defs.' Mot. for Summ. J., *Oklahoma v. Burwell*, No.6:11-cv-00030-RAW (E.D. Ok. Mar. 19, 2014), 3-4. In various permutations, it has been embraced by the Respondents and some of their *amici*, and it has been articulated approvingly in some lower-court opinions *See, e.g., Halbig v. Sebelius*. 2014 WL 129023, *14 (D.D.C. 2014) ("[E]ven where a state does not actually establish an Exchange, the federal government can create "an Exchange established by the State under [42 U.S.C. § 18031]" on behalf of that state." *See also, King v. Burwell*, 759 F.3d 358, 378 (4th Cir. 2014) (concurring opinion of Senior Circuit Judge Davis) ("[T]he contingency provision [*i.e.*, ACA § 1321(c)] permits federal officials to act in place of the state when it fails to establish an Exchange.") The district court in this matter also accepted the fundamental premise of the equivalence theory. *See, King v. Sebelius*, 997 F. Supp. 2d 415, 419 ("States may establish and operate [an] Exchange pursuant to 42 U.S.C. § 18031 ('Section 1311'), or the federal government may establish and operate an Exchange in place of the state where a state has chosen not to do so consistent with federal standards pursuant to 42 U.S.C. § 18041 ('Section 1321').") *See, also, id.*, 997 F. Supp. 2d at 428 (as a threshold matter, interpreting ACA § 1321(c) to provide that if a State has not established its own Exchange by January 1, 2014, the Secretary of the HHS will create an ACA § 1311 Exchange for the State) (citing *Halbig v. Sebelius*, 2014 WL 129023 (D.D.C. 2014)).

under [Code] § 36B(b)(2) [as added by ACA § 1401(a)]."

The plain meaning of the operative language of Code § 36B establishes all facts necessary to invalidate the IRS Rule, and the law supports Petitioner. *See, Lawson v. FMR LLC*, 134 S. Ct. 1158, 1166 (2014) ("Absent any textual qualification, we presume the *operative* language means what it appears to mean . .") (emphasis added); *and see, also, Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (noting a presumption that Congress's intent is expressed correctly in the ordinary meaning of the words it employs).

This matter constitutes an easy case of statutory interpretation if the distractions of the equivalence theory are put aside, as it is merely a cynical, *ad hoc,* and unsound distraction, and further evidence (if any were needed) that the Executive Branch "now wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 499 (2010).

The equivalence theory is not the contextual or holistic mode of statutory interpretation it is portrayed as. Moreover, it is unnecessary because Respondents fail to show that Code § 36B is in any way unclear or ambiguous. Examination of the statutory text proves that Congress intended Code § 36B to convey its meaning in unmistakable terms without the need to consult other provisions of the ACA. Moreover, when the Government's argument ventures outside Section 36B, the result is purely arbitrary. The Government's supposed "construction" of the provisions it chooses to consider

violates elementary canons of statutory construction. Moreover, the perceived "ambiguity" resulting from the Government's analysis—even assuming that it bears upon the interpretation of Section 36B—is entirely a product of the equivalence theory itself, not the application of an interpretive method.

The essence of the equivalence theory is to *posit* that the phrase "such Exchange" in ACA § 1321(c) refers to the phrase "required Exchange" earlier in that section, and that the term "required Exchange" can mean only an Exchange established by a State under Section 1311 of the ACA. A careful reading of the relevant text shows the phrase "such Exchange" cannot possibly support this tortured interpretation.

Moreover, not even the axiom planted by the equivalence theory is enough to justify the IRS Rule. Both before and after the equivalence theory is applied, the ACA draws a perfectly clear and intelligible distinction between federal and state Exchanges.

Finally, the conclusions attributed to the equivalence theory would generate absurd consequences and lead to an interpretation of several provisions of the ACA that would cast serious doubt on their constitutionality under the anti-commandeering doctrine in *Printz v. United States*, 521 U.S. 898 (1997), and/or under the anti-coercion rule in *South Dakota v. Dole*, 483 U.S. 203 (1987), as most recently applied by this Court in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (*"NFIB"*).

ARGUMENT

I. The Equivalence Theory Is Not An Exercise of a Contextual or Holistic Interpretation of the ACA.

Relentless tension exists between the substance of the equivalence theory and the way it is portrayed by its adherents. The Government's argument does not resolve or even acknowledge this tension, making it a useful place to begin a critique.

The equivalence theory purports to be textual in form. *See* Gluck, *supra*. However, the Government's argument based on this theory culminates in an undeniable textual contradiction: that an Exchange established by the HHS Secretary under ACA § 1321(c) is an Exchange established by a State under ACA § 1311.[4] Thus, the Government uses a supposedly textual interpretive methodology to support a completely anti-textual interpretation. The disconnect should be cause for profound unease about the validity of the IRS Rule.

The equivalence theory is not the result of a contextual or holistic approach to statutory interpretation. In fact, the IRS Rule, and the equivalence theory on which it rests, is not the result of statutory interpretation at all. It is a clumsy and

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[4] *Cf., e.g.*, Richard Epstein, Understanding the Obamacare Subsidy Rulings, July 22, 2014, available at https://ricochet.com/understanding-obamacare-subsidy-rulings/ ("[L]ong and learned opinions should not obscure the fact that at the root of the case is a simple question: Do the words an "exchange established by a State" cover an exchange that is established by the federal government "on behalf of a state"? To the unpracticed eye, the two propositions are not synonyms, but opposites.")

gross statutory rewrite—an attempt to conform the statute that Congress wrote to the Executive branch's sense of "the broad scheme of the ACA" and/or what an unknown agency official believed Congress *should* have written. *See* H. Comm. on Oversight & Gov't Reform and H. Comm. On Ways & Means, Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies at 22.[5] That approach is incompatible with bedrock principles of the separation of powers and constitutional government.

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[5] An official whose identity the IRS refused to reveal to Congress wrote the only paragraph of the only memorandum created by Treasury or the Service between the date of the proposed regulations and the date of the IRS Rule discussing the reasoning for extending tax credits based on enrollment for coverage through Section 1321(c) Exchanges.

> The term "established by a state" may be read as a restriction on the term "exchange" or it may be read as simply descriptive language. Interpreting the language as a restriction is inconsistent with the broad scheme of the ACA to increase health insurance availability. Denying a premium tax credit to taxpayers enrolled in a QHP through the fed exchange while allowing a credit to those enrolled through state exchanges would be an incongruous result and could not have been Congress' intent.

House Oversight Committee Report, 22.

A. The Equivalence Theory Relies on Arbitrary Presuppositions.

The first presupposition is that the text of Code § 36B is insufficient, standing alone, to resolve the question of statutory construction at the heart of this case. This presupposition is shown to be incorrect in Section IV below.

B. The Historical Facts Show That Respondents Did Not Consider the Actual Use of Section 1321(c) to Establish Any Exchange Until After Learning About the Differing Tax Consequences For Persons in Electing *Versus* Non-Electing States.

The second presupposition is a false conclusion about the purpose of ACA § 1321(c). For over eleven months post-adoption, Section 1321(c) was never intended to do more than camouflage an on-going commandeering problem with ACA § 1311[6] and be a source of additional pressure on the States to promptly establish Exchanges. Only later did Respondents began to have serious doubts regarding lawful authority to extend premium assistance tax credits under Section 36B to enrollments through Exchanges other than those established by a State under ACA § 1311. *See* House Oversight Committee Report, 21 ("According to an email exchange reviewed by the Committee on Oversight and

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[6] *See* Testimony of Professor Timothy Jost, Hearing Transcript, *supra*, 36 ("Because Congress cannot, however, Constitutionally require a State to establish exchanges, Section 1321.C provides that the HHS Secretary shall establish and operate such exchange within a State, referring to the 1311 State, if a State fails to do so.")

Government Reform, Treasury officials began considering the applicability of *Chevron [U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984)]* to this issue nearly six months before the promulgation of the final rule.") and *see id.* at 7 (describing reliance on *Chevron* as authority for a tax regulation as "extremely unusual").

In fact, ACA § 1321(c) was intended to serve two limited purposes, neither involving actual Exchange creation. First, Section 1321(c) was considered a specific protection against the federalism doctrines underlying cases such as *Printz v. United States*, 521 U.S. 898 (1997). Second, the HHS Secretary's theoretical ability to take control of the Exchange creation process away from a State government was part of the system of goads intended to encourage States to establish Exchanges. There is no basis to believe that when the PPACA and later the HCERA were enacted, Congress considered that any Exchange actually would be established under Section 1321(c). Nothing in the administrative record of the IRS Rule even hints at this possibility.

According to IRS and Treasury employees interviewed by the Committees, the first discussion of whether the Administration had statutory authority to provide subsidies in federal exchanges occurred in March 2011. Emily McMahon, then Acting Assistant Treasury Secretary for Tax Policy saw an article in *Bloomberg BNA* discussing legal challenges to the PPACA. The article referenced a December 6, 2010 conference at the American Enterprise Institute during which a speaker explained that the individual income tax credit under Section 1401 available for citizens of states

that have established their own exchanges is not available to citizens of states with HHS exchanges. Ms. McMahon forwarded the *Bloomberg BNA* article to members of a working group for input. House Oversight Committee Report, 3. An earlier draft of what eventually became the IRS Rule had included the phrase "Exchange established by the State" in the section entitled "Eligibility for the Premium Tax Credit." Between March 10, 2011, and March 15, 2011, the explicit reference to "Exchanges established by the State" was removed and the phrase "or 1321" was inserted in its place. *Id.*, 16-17.

II. Code § 36B Clearly and Unambiguously States the Only Circumstances Under Which Premium Assistance Tax Credits May Be Allowed.

Petitioners correctly address about the advantages of their traditional approach to interpreting Code § 36B(b). The plain meaning analysis of Section 36B(a)-(b)(1)-(2) leaves all subsections of Section 36B in harmony. It creates no absurdity when Section 36B(a)-(b)(1)-(2) is viewed in the context of the provision as a whole. It faithfully reflects the statute Congress enacted. Neither Petitioners nor *Amicus* contend that these provisions of the ACA worked in practice as some members of Congress might have hoped. However, that is a very different question than the question at hand, *i.e.*, did the Congress clearly and unambiguously explain under what conditions an individual would be entitled to a premium assistance tax credit? If Congress is not happy with the outcome of its rule, then Congress, not this Court, must provide the

course correction. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004).

Code Section 36B was added by the only section of the PPACA that determines or even purports to determine whether the IRS may allow a premium assistance tax credit against taxable income. *See* PPACA § 1401(a). Code Section 36B includes seven subsections, (a)-(g), but only two of them – subsections (a) and (b) – are directly relevant to the issue of statutory interpretation here.

A. The Pertinent Text of Code § 36B(a)-(b).

Code § 36B(a) provides, "In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year."

Code § 36B(b)(1) provides that for purposes of Section 36B, "The term 'premium assistance credit amount' means, with respect to any taxable year, the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year."

Code § 36B(b)(2) provides

> The premium assistance amount determined under this subsection with respect to any coverage month is the amount equal to *the lesser of*—
>
> (A) *the monthly premiums* for such month *for 1 or more qualified health plans* offered in the individual market within a State which cover the taxpayer, the taxpayer's

> spouse, or any dependent (as defined in section 152) of the taxpayer and *which were enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act*, or
>
> (B) the excess (if any) of—
>
> (i) the adjusted monthly premium for such month for the applicable second lowest cost silver plan with respect to the taxpayer, over
>
> (ii) an amount equal to 1/12 of the product of the applicable percentage and the taxpayer's household income for the taxable year.[7]

See 26 U.S.C. § 36B(b)(2) (emphases added).

B. Two Important Features of Code § 36B(a)-(b) Show That Congress Did Not Leave the Tax Credit To the IRS's Regulatory Discretion.

Amicus contends that subsections (a) and (b) of Code § 36B include two subtle but important features with consequences for the proper interpretation of Section 36B. The credit allowable under Code § 36B(a) is "an amount." In the context of a tax credit, "amount" means a definitively determined sum. Second, allowability of such credit does not depend on a determination of the amount

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[7] Section 36B(b) includes a subsection (3) that elaborates on the terms used in the alternative calculation described in Section 36B(b)(2)(B). However, Section 36B(b)(3) is not reproduced above because the Section 36B(b)(2)(A) calculation is the only one pertinent herein.

under Treasury regulations or other guidance from the IRS. The amount constituting the tax credit is "an amount equal to the premium assistance credit amount of the taxpayer for the taxable year." *See* 26 U.S.C. § 36B(a).

An amount cannot be determined definitively unless it is determinable. This is why Code § 36B(a) is significant: the text of Section 36B(a) establishes *as a condition for every allowance of a credit* that its amount be capable of determination by applying the statutory definition of "the premium assistance credit amount of the taxpayer for the taxable year."

There is only one definition of "the premium assistance credit amount of the taxpayer for the taxable year" to be found anywhere within the PPACA. It is located in Code § 36B(b)(1), and provide a taxpayer's yearly premium assistance credit amount is the sum of the taxpayer's "premium assistance amount" for each calendar month during the taxable year. *See* 26 U.S.C. § 36B(b)(1).

The premium assistance amount for each month is determined by applying the formula spelled out in Code § 36B(b)(2), and results in a unique, specific, and objectively-determined amount. This, *Amicus* believes, is yet another indication that Congress did not leave room for the exercise of IRS discretion in allowing a premium assistance tax credit.

The Code § 36B(b)(2) statutory formula specifies using "the lesser" of two alternative calculations. One such alternative amount is the premium for enrolling in coverage obtained by the taxpayer, the taxpayer's spouse, and/or the taxpayer's dependent(s) "through an Exchange established by the State under 1311 of the Patient Protection and

Affordable Care Act." Code § 36B(b)(2)(A). The Section 36B(b)(2)(A) amount is zero unless the taxpayer or family member enrolled for coverage "through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act." This is so because *there is no premium that matches the description in Code § 36B(b)(2)(A)* unless the taxpayer or a family member was enrolled in coverage "through an Exchange *established by the State under 1311* of the Patient Protection and Affordable Care Act." *Id.* (emphasis added). Recalling that when the formula is applied to a given taxpayer, the premium must be an objectively-determined amount, it follows that the amount of the premium must be determinable *as a matter of fact*. The only conclusion permitted from the text of Section 36B(a)-(b), then, is that a taxpayer is not entitled to a premium assistance tax credit if the taxpayer and family members were not enrolled for coverage during any month of the year through a Section 1311 Exchange established by the State.

Congress adopted PPACA § 1401(a) on the assumption that it was both unnecessary and inappropriate to allow IRS regulations to define the meaning of the phrase "an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act" to IRS regulations purporting to resolve a question of law. Code §§ 36B(a)-(b) also speak clearly to the precise matter on which the IRS Rule presumes to speak differently. Thus, to sustain the validity of the IRS Rule, the Government must convince this Court that the real question is whether the IRS Rule is consistent with something other than Code §§ 36B(a)-(b). But the Government places its foot wrong in the first step toward that goal, and

therefore fails to substantiate the assumption that Code §§ 36B(a)-(b) alone are not sufficient to determine the validity of the IRS Rule.

C. The Text of Section 36B Is Self-Contained, Not Deficient.

The Government's argument necessarily relies on the proposition that the text of Code § 36B is deficient. Because the Government's argument is based on the equivalence theory, the supposed deficiency is presumed to render the phrase "an Exchange established by a State under [ACA] section 1311" indeterminate if not simply unintelligible unless the meaning of that phrase is based on a construction of ACA §§ 1311 and 1321(c). Just as there was no merit to the Government's claim that the meaning of that phrase is indeterminate, there also is no merit in the Government's claim that an interpretatior of ACA §§ 1311 and 1321(c) is indispensable.

ACA § 1401(a) was the only provision of the PPACA that created or purported to create an individual income tax credit based on health insurance premiums. Section 1401(a) accomplished this by taking only one step: adding Section 36B to the Code. Obviously, understanding the availability and amount of the credit created by Section 1401(a) cannot *ignore* Code § 36B(a)-(b). But taking Sections 36B(a)-(b) into account *to any degree* is fatal to the Government's argument. Once those sections are in the picture to any extent, it is no longer sufficient for the Government's purpose to find a provision of the ACA that is "inconsistent" with Code § 36(a)-(b). It is necessary for the Government to find some provision of the ACA that *contradicts* the plain meaning of the

terms of Section 36B(a)-(b). And to justify searching for such a provision, it is necessary to show that search is required as part of the interpretive process.

It is logically impossible for Code § 36B to be other than clear in this regard. If Congress drafts a new provision of the Code that contains an ambiguity – something that *Amicus* denies happened in this case – the "legislative grace" doctrine would apply to cure the defect before it could become subject to IRS discretion during the rulemaking process. *Cf. New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934) ("Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."); and *Interstate Transit lines v. Com'r*, 319 U.S. 590, 592(1943) (describing the "legislative grace" doctrine as a "rule").

Resort to the legislative grace doctrine is not necessary here, however, because Code § 36B explicitly limits allowance of premium assistance tax credits to cases in which there has been an enrollment for coverage "through an Exchange *established by a State under [ACA] section 1311*." *Id.*, 26 U.S.C. § 36B(b)(2). Moreover, the Government cannot mount a tenable argument for impeaching the plain meaning of Section 36B to pave the way for the Government's non-textual interpretation. Code § 36B is completely self-contained in stating the only circumstances under which Congress made premium assistance tax credits available.

III. Code § 36B(g) Shows That Congress Considered the Provisions of Section 36B

To Be Self-Contained and Sufficient To Permit the Issuance of Regulations To Put Those Provisions Into Effect.

The fallacy in the Government's argument regarding Code §§ 36B(a)-(b) is demonstrated independently by Code § 36B(g). As added by the PPACA, Code § 36B(g) provides

> The Secretary [of the Treasury] shall prescribe such regulations as may be necessary to carry out *the provisions of this section*, including regulations which provide for—
>
> (1) the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act, and
>
> (2) the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit.

See 26 U.S.C. § 36B(g) (emphasis added).[8]

Section 36B(g) confirms that Congress intended 36B(a) & (b)(1)-(2) to be a sufficient basis for determining the question presented here. That section requires the Secretary of the Treasury to "prescribe such regulations as may be necessary to carry out *the provisions of this section . . .* " *See* 26 U.S.C. § 36B(g) (emphasis added). Code § 36B(g) does *not* delegate authority to prescribe regulations to carry out provisions found in other sections of the

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[8] As explained below, the "subsection (f)" referred to in Section 36B(g) is *not* the language found in 26 U.S.C. § 36B(f).

ACA. Moreover, it delegates *only* the power to prescribe regulations to carry out Section 36B's *provisions*, not to carry out "the purposes" of its provisions, let alone "the purposes" of the Act as a whole. It makes no mention of ACA § 1311 or 1321(c). For these reasons, Section 36B(g) shows Congress considered it possible for the IRS to promulgate meaningful regulations to carry out the provisions of Section 36B without reference to anything outside the provisions of Section 36B.

Significantly, Section 36B(g) certainly does not delegate the power to authorize the allowance of a premium tax credit on the only basis the IRS ever asserted as a justification for the IRS Rule. The preamble to the final Section 36B regulations implicitly claimed that Treasury was authorized to prescribe regulations granting tax credits based on coverage enrolled in through a "Federally-facilitated Exchange" because "[t]he statutory language of section 36B *and other provisions* of the Affordable Care Act support the interpretation" – of what, the Preamble does not say – "that credits are available to taxpayers who obtain coverage through . . . the Federally-facilitated Exchange." 77 Fed. Reg. at 30,378 (emphasis added); *and cf.* 45 C.F.R. § 155.20 ("Unless otherwise identified, this term [Exchange] refers to State Exchanges, regional Exchanges, subsidiary Exchanges, and a Federally-facilitated Exchange."). That implication is false. Section 36B plainly does not authorize the IRS Rule or *any* regulation on the grounds that, combined, the statutory language of *different* provisions of the ACA "support" an "interpretation" of some unspecified language that may or may not be found within the ACA.

Thus, Section 36B(g) cuts sharply against one of the fundamental assumptions of the equivalence theory, namely the *a priori* premise that an interpretation of ACA §§ 1311 and 1321(c) is essential to determining the meaning of Section 36B(a) & (b)(1)-(2). Section 36B(g) cannot be interpreted as anything other than direct evidence of Congress's actual understanding of Section 36B(a)-(b). In light of Section 36B(g), the Government's approach to the only question herein is completely misguided. Provisions of the Affordable Care Act outside Code § 36B are not sources of delegated rule-making power authorizing the allowance of a premium tax credit that Section 36B prohibits. The Government's search for that authority fails.

IV. The Argument That Section 36B(f)(3) Creates an Internal Inconsistency in Section 36B Is Wrong.

The Government wrongly contends that Code § 36B(f)(3) would be deprived of any meaning unless Code § 36B(a)-(b) is ambiguous.[9] The language currently codified in 26 U.S.C. § 36B(f) did not exist when the PPACA became law, but was added by Section 1004 of *the HCERA* as a *substitute* for the language of Code § 36B(f) adopted by PPACA. Legislative intent has been called the touchstone of statutory interpretation, *see, e.g.*, Robert Anthony,

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[9] *Amicus* agrees with Petitioners that the Government is arguing an irrelevant point. Pet. Br. at 45. Even if 26 U.S.C. § 36B(f)(3) had been included in the PPACA, nothing therein contradicts the plain meaning of "Exchange established by a State under [ACA] section 1311," which is the relevant language in Code 36B(b).

Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1, 4 (1990), but the codified version of Section 36B(f) is not evidence of the intent behind Code §§ 36B(a) and (b)(1)-(2).[10] Only the plain language of Code §§ 36B(a) and (b)(1)-(2) serve that purpose. 26 U.S.C. § 36(f) does not speak at all to the meaning of Section 36B(b)(1)-(2).

Even assuming (contrary to the facts and the law) that the codified version of 26 U.S.C. § 36(f) had been part of the PPACA when the PPACA became a law, the codified version of 26 U.S.C. § 36(f) does not speak to the intent behind or the meaning of 26 U.S.C. § 36B(a)-(b)(1)-(2). This is so precisely because of the very "political realities" the Government is likely to raise for blending the two actual Acts into one make-believe Law. Because of perceived political needs, the text of what is now 26 U.S.C. § 36B(f) was formulated by a handful of insiders behind closed doors, and was voted on by the

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[10] The Government may treat both measure as if they actually were parts of the same Bill, based on the unusual political events of the times. *Amicus* recognizes that the *parliamentary* steps securing the HCERA's adoption were atypical. Nonetheless, the HCERA was enacted *separately from* the PPACA, *after* the PPACA, enrolled *separately* from the PPACA, and it became a Law when the President signed the enrolled copy of the HCERA, which occurred *on a different day* than the President signed the enrolled copy of the PPACA. The legal significance of these historical facts stem directly from *Field v. Clark*, 143 U.S. 649 (1892), *not* from the politics surrounding the adoption of the two laws. Moreover, there is a constitutional necessity to consider: treating two separately enrolled bills as if they were one paves the way for an end-run around the prohibition against the line-item veto. *Cf. Clinton v. New York*, 524 U.S. 417 (1998) (striking down the line item veto holding as inconsistent with the Presentment Clause).

House of Representatives under a rule precluding amendments and requiring a vote on a short deadline. *See* H. Res. 1225, 111th Cong., 2d Sess. (Mar. 25, 2010), relating to H.R. 4872, as amended by Senate Amendments to H.R. 4872. Effectively, the House rendered itself incapable of having an intention regarding Code 36B(a)-(b) other than the intention found in the plain language of what is now codified at 26 U.S.C. 36B(a)-(b), just because of the "political reality" that some Members of Congress might not agree with every particular that had been approved by Senate insiders.

V. The Equivalence Theory Has No Basis in the Statutory Text.

The essence of the equivalence theory is that the Exchange established by the HHS under Section 1321(c) is "an Exchange established by a State under [ACA] section 1311." That argument rests on a set of *a priori* assumptions, *i.e.*, (1) that the only relevant portion of the text of ACA § 1321(c)(1) is ACA § 1321(c)(1)(B); (2) that the antecedent of the phrase "such Exchange" that appears in the flush language following ACA § 1321(c)(1)(B)(ii)(II) is the phrase "required Exchange" in ACA § 1321(c)(1)(B)(i); (3) that it is necessary to look outside Section 1321(c) to identify what the words "required Exchange" refer to; and (4) that Section 1311 requires every state to establish an Exchange (and therefore is the answer to the question, "Where outside Section 1321 does the ACA require establishing an Exchange?").

Each of these assumptions is false. While parsing can be tiresome, it is worth undertaking, beginning with the relevant statutory text.

A. The Text of ACA § 1321(a)-(d).

§ 1321. State flexibility in operation and enforcement of exchanges and related requirements.

(a) Establishment of standards.

(1) In general. The Secretary shall, as soon as practicable after the date of enactment of this Act, issue regulations setting standards for meeting the requirements under this title, and the amendments made by this title, with respect to-

(A) the establishment and operation of Exchanges (including SHOP Exchanges); . .

(b) State action. Each State that *elects*, at such time and in such manner as the Secretary may prescribe, to apply the requirements described in subsection (a) shall, not later than January 1, 2014, *adopt and have in effect*—

(1) the Federal standards established under subsection (a); or

(2) *a State law or regulation* that the Secretary determines implements the standards within the State.

(c) Failure to establish Exchange or implement requirements.

(1) In general. If—

(A) a State is not an electing State under subsection (b); or

(B) the Secretary determines, *on or before January 1, 2013*, that *an electing State*—

> (i) *will not have any required Exchange operational by January 1, 2014*; or
>
> (ii) has not taken the actions the Secretary determines necessary to implement—
>
> (1) the other requirements set forth in the standards under subsection (a); or
>
> (II) the requirements set forth in subtitles A and C and the amendments made by such subtitles;
>
> the Secretary shall (directly or through agreement with a not-for-profit entity) *establish and operate such Exchange within the State* and the Secretary shall take such actions as are necessary to implement such other requirements. . . [11]

B. Preliminary Observations Regarding the Text of Section 1321(b).

Amicus begins with the following observations from the text of Section 1321.

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[11] The language underlined in the foregoing quotation follows Section 1321(c)(1)(B)(II)(ii), but each line of it begins directly beneath ACA § 1321(c)(1)(B). Text following a subdivision that begins at a margin further to the left, flush with the division preceding the subdivision, is often referred to as the "flush language" of the division. *See, e.g.*, Victor Thuronyi, Drafting Tax Legislation, in 1 Tax Law Design and Drafting 78 (1996). *Amicus* abides by that convention to refer to the underscored language.

First, the flush language following ACA § 1321(c)(1)(B)(II)(ii) requires exchange-establishment. This observation reveals that Respondents acted arbitrarily to select ACA § 1311 as the "requirement" that Exchanges be established and to select Section 1321(c) as the "backstop."

Second, the plain meaning of Section 1321(c) shows that the HHS Secretary's authority to create an Exchange is exercisable in only the circumstances described in Sections 1321(c)(1)(A), (c)(1)(B)(i), and (c)(1)(B)(ii). Yet the flush language is aligned with Subsection 1 as a whole, including Subsection 1321(c)(1)A). Subsection (1)(A) does not use the phrase "required Exchange or even the word "Exchange. If the Governments argument in this case were assumed to be true for the sake of argument, it would follow that the phrase "such Exchange" in the flush language cannot have the phrase "required Exchange" as its antecedent. Thus, the Government's argument is absurd in the logical sense, because assuming the truth of its conclusion causes on of its essential premises to be proven false.

Fourth, even if the Government could prove rather than merely assume that the term "such Exchange" in the flush language refers to an Exchange established under Section 1311 – and it cannot prove such a thing – the Governments argument would not be sufficient to create pop-up ambiguity in text of Code § 36B. The operative language in Code § 36B includes "an Exchange *established by a State* under [ACA] section 1311." *See* 26 U.S.C. § 36B(b)(1)-(2) (emphasis added). An Exchange established under Section 1321(c) is

established by the HHS Secretary, and not "by a State."

To accomplish its mission, then, the equivalence theory must incorporate an additional unstated premise. It must assume or show that an Exchange established by the HHS Secretary in a State *is* an Exchange established by that State. *Cf., e.g., King v. Burwell* 759 F.3d at 377 (concurring opinion of Senior Circuit Judge Davis). Given the plain meaning of Code § 36B, merely treating an action by a Cabinet officer "as if" the action had been taken by a governor will not do. The equivalence theory must assume or demonstrate that the result of Secretarial establishment of an Exchange in a given State under ACA § 1321(c) is "an Exchange established *by [that] State* under [ACA] section 1311." *See,* 26 U.S.C. § 36(B)(b)(1) (emphasis added). Yet an Exchange cannot be established under Section 1311 without the affirmative act of a state's legislature, governor, or both. *See,* ACA §§ 1311(b)(1)(C) and 1311(d)(1); *and see, also,* Exchange Creation and Blueprint Letter to Governors ("Blueprint Letter"), Kathleen Sebelius to U.S. Governors, Nov. 9, 2012.[12] Thus, the

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[12] This view is now shared even by Prof. Jost. As he wrote recently, "A careful reading of the law suggests that a state 'establishes' an exchange when, exercising the legal powers of the executive or legislative branch, the state government takes certain actions . . ." T. Jost, *Implementing Health Reform: What Makes A State Exchange? (Updated),* available at http://healthaffairs.org/blog/2014/07/28/implementing-health-reform-what-makes-a-state-exchange/ (last visited December 2, 2014). "[T]he definitional subsection of [ACA § 1311], provides, 'An Exchange shall be a governmental agency or nonprofit entity that is established by a State.'" *Id.* "Section 1321 would suggest, therefore, that some sort of state law or regulation is necessary to establish an exchange." *Id.* "In sum, for a state to

equivalence theory must go the full metaphysical distance needed to show that the HHS Secretary *is* the governor and/or the legislature of the state. There simply is no support in the ACA for that conclusion.

C. The Equivalence Theory Leads to An Absurd Construction of ACA §§ 1311 and 1321(c)

In order for an Exchange to be established under ACA § 1311, there must be an affirmative exercise of the authority of a state governor and/or a state legislature. *See* ACA § 1311(d)(1). There is no evidence that the HHS Secretary has established an Exchange under Section 1321(c) that is an Exchange described in ACA § 1311. Indeed, everyone agrees that is impossible under *Printz*. The Government's argument collapses because its conclusion is demonstrably incompatible with one of the fundamental bases of federalism in a republic where the sovereignty of the people is divided to protect individual rights. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

Section 1311 itself is further proof that the equivalence theory is unsound. Section 1311 cannot be interpreted to require a State to establish an

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'establish' its own exchange it must: [e]nact authorizing legislation or a have a properly issued executive order establishing the exchange " *Id. See also*, N. Bagley, D. Jones, & T. Jost, *Perspective*, "Predicting the Fallout from *King v. Burwell* – Exchanges and the ACA," in New Eng. J. Med. (Dec. 10, 2014, available at http://www.nejm.org/doi/full/10.1056/NEJMp1414191 (last visited December 17, 2014).

Exchange without affirmative steps on the part of elected state officials. Thus, Section 1311 cannot be harmonized with the interpretation of Section 1321(c) that the equivalence theory posits. That interpretation depends on assuming that Sections 1311 and 1321(c) authorize the *direct* exercise by the HHS Secretary of the law-making and/or rule-making authority lodged with the elected public officials by the people of a *non-electing* state. That interpretation is both unsupported and incorrect. There is no word, no phrase, no sentence in Sections 1311 and/or 1321 that could possibly be interpreted to mean that Congress delegated to the HHS Secretary a power to exercise directly (or indirectly) the authority of any organ of a state government. There is nothing to suggest that Congress authorized a Cabinet official to become the "agent" of a state government for purposes of adopting specified laws and regulations in the place and stead of (for example) an incumbent governor and her successors in office. It beggars belief to maintain that the ACA authorizes any state elected official to appoint another individual to carry out his or her official functions as his or her "agent."

The equivalence theory relies not only on the direct exercise of state authority by the HHS Secretary, but also the *displacement* of the individuals selected by the citizens of the State to exercise that authority. Just as there is no language anywhere in ACA §§ 1311 and 1321(c) that purports to allow the Secretary to wield state authority directly, so too there is no language anywhere in ACA §§ 1311 and 1321(c) that purports to allow the HHS Secretary to oust any elected official of a State from the role of exercising that authority.

Moreover, the interpretation of Sections 1311 and 1321(c) that would permit this type of commandeering-by-substitution would cast grave doubt on the constitutionality of Section 1321(c). The Government's argument places the Act right back into the constitutional doubt that Section 1321(c) was intended to rescue it from. Establishing an Exchange generally requires the action of both of the political branches of a state government. Thus, if it were true that Section 1321(c) empowered the HHS Secretary to establish an Exchange under ACA § 1311 for a non-electing state, the secretary could do so only by directly wielding the authority of elected state officials. If it were true that Section 1321(c) empowered the HHS Secretary to establish an Exchange under ACA § 1311 for an electing state based on her discretionary decision that the state was not moving along quickly enough toward readiness on January 1, 2014, then the authority conferred by Section 1321(c) would act as a goad forcing state governments to shift their priorities after electing to establish an exchange. In either event, there is an element of coercion that calls the constitutionality of Section 1321(c) into serious doubt. Thus, the Government's argument is undone by the Government's conclusion from that argument. In the purely hypothetical world in which the HHS Secretary is imagined to create Section 1311 Exchanges by exercising her authority under Section 1321(c), the anti-commandeering defect Section 1321(c) was adopted to ward off would come roaring back with a vengeance.

In addition, the IRS Rule would be in greater jeopardy if, as a matter of law, the HHS Secretary could create a Section 1311 Exchange inside the

territorial jurisdiction of a State without the consent of that State. When an Exchange is established by a State, ACA § 1313 gives the HHS Secretary the power to coerce the State into the Secretary's interpretation not just of the Exchange rules, but even of the ACA's consumer protection provisions, in a way that cannot be reconciled with *Dole* or *NFIB*. Thus, the very conclusion the Government wants to demonstrate with its absurd construction of ACA § 1321(c) would be ruled out by the avoidance canon, as discussed below.

Moreover, the Government's interpretation of ACA § 1321(c) is an example of overreach, because it strays incredibly far from the basic proposition that statutory interpretation "must begin with the plain language of the statute." *Negusie v. Holder*, 129 S.Ct. 1159, 1178 (2009). The gulf separating that basic rule from the Government's defense of the IRS Rule illustrates the "danger posed by the growing power of the administrative state," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting), and this Court should continue to uphold the constitutionally-grounded principles that must continue to guide and limit the operations of the administrative state. In particular, this Court should reiterate that agencies may exercise only powers delegated to them by Congress. *Civil Aeronautics Bd. v. Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961). An agency has "no power to 'tailor' legislation to its bureaucratic goals by rewriting unambiguous statutory terms" or "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445-46 (2013). Courts, for their part, have no business "fixing" unworkable or

poorly drafted statutes. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004). *See also, Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2023, 2033 (2014) ("[T]his Court does not revise legislation . . ."). Time and again, the Court has reiterated and enforced these bedrock principles. *See, e.g., Williamson v. U.S.*, 207 U.S. 425 (1908). This case calls for yet another such reaffirmation because the HHS Secretary's direct exercise of state legislative and/or gubernatorial power imposes at least two burdens on the state governments, creating corresponding advantages for the national government:

First, if an Exchange established under Section 1321(c) were a Title I, Subtitle D, Part II Exchange – *i.e.*, a Section 1311 Exchange – the State on behalf of which it was created would be subject to ACA § 1313(a)(4). That provision states

> If the Secretary determines that an Exchange or a State has engaged in serious misconduct with respect to compliance with the requirements of, or carrying out of activities required under, this title, the Secretary may rescind from payments otherwise due to such State involved under this or any other Act administered by the Secretary an amount not to exceed 1 percent of such payments per year until corrective actions are taken by the State that are determined to be adequate by the Secretary. It triggers on-going Secretarial supervision and control over the state's compliance with federal law, backed up by the

> permanent loss of up to one percent of all earned but unpaid federal reimbursements due under all programs administered in whole or in part by the Department of Health and Human Services ("HHS"). *See*, ACA § 1313.

Second, if an Exchange established under Section 1321(c) were an Title I, Subtitle D, Part II Exchange – *i.e.*, a Section 1311 Exchange – the State on behalf of which it was created would be required to make it financially self-sustaining by January 1, 2015. *See*, ACA § 1311(d)(5). To be sure, if an Exchange actually were a Section 1311 Exchange, the State is permitted to use any means to accomplish this goal, including perhaps dipping into general revenues or charging user fees to health insurance carriers that do business on the Exchange. But in the context of a Section 1321(c) Exchange, it is unclear how a State could pass on its financial burden.

The notion that a federal statute authorizes the HHS Secretary to confer on her department the ability to wield the coercive powers over a state permitted under ACA § 1313 and saddle a State with financial responsibility for a federally-created Exchange cannot be reconciled with this Court's ruling in *NFIB*. Thus, endorsing the equivalence theory imperils the constitutionality of the Act, including ACA §§ 1311(d)(5) and 1313.

These factors are yet another reason to reject the conclusions to which the equivalence theory leads. When a statute can be construed in two ways, and one construction raises a serious question regarding its constitutionality, a court must choose the alternative interpretation. *See, Clark v. Martinez*, 543 U.S. 371, 381-85 (2005). This rule is fully

operative when the constitutional infirmity arises because one construction could collide with one of this Court's federalism decisions. A unanimous opinion for the Court written by Justice Ginsburg invoked the avoidance canon to reject an interpretation of statutory language that would raise serious doubts about the statute's constitutionality under *Lopez v. United States*, 514 U.S. 549 (1995). *See, Jones v. United States*, 529 U.S. 848, 851 (2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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